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SERVICE DATE - JANUARY 14, 1999

SURFACE TRANSPORTATION BOARD[1]

DECISION

No. 41040

CONAGRA, INC. D/B/A ARMOUR FOOD COMPANY--PETITION FOR DECLARATORY ORDER--CERTAIN RATES AND PRACTICES OF CENTRAL DISTRIBUTION CARRIERS, INC.

Decided: January 11, 1999

We find that the collection of undercharges sought in this proceeding would be an unreasonable practice under 49 U.S.C. 10701(a) and section 2(e) of the Negotiated Rates Act of 1993, Pub. L. No. 103-180, 107 Stat. 2044 (NRA) (now codified at 49 U.S.C. 13711). Accordingly, we will not reach the other issues raised in this proceeding.

BACKGROUND

This matter arises out of a court action in the District Court of Douglas County, Nebraska, in Central Distribution Carriers, Inc. v. Armour Food Company, DOC 909 No. 035. The court proceeding was instituted by Central Distribution Carriers, Inc. (Central or respondent), a former motor common and contract carrier, to collect undercharges from ConAgra, Inc., d/b/a Armour Food Company (Armour or petitioner). Central seeks undercharges of $14,527.42 (plus interest) allegedly due, in addition to amounts previously paid, for services rendered in transporting 32 shipments of meat and related products between August 18, 1989, and April 15, 1990. The shipments were transported from Armour's facilities at Eau Claire, WI, to the facilities of Hawkeye Foods at Iowa City, IA. By order entered February 16, 1993, the court stayed the proceeding and directed petitioner to submit issues of rate reasonableness and unreasonable practice to the ICC for determination.

Pursuant to court order, Armour, on July 6, 1993, filed a petition for declaratory order requesting the ICC to resolve issues of rate reasonableness, unreasonable practice, and tariff

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[1] The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (the ICC Termination Act or the Act), which was enacted on December 29, 1995, and took effect on January 1, 1996, abolished the Interstate Commerce Commission (ICC) and transferred certain functions and proceedings to the Surface Transportation Board (Board). Section 204(b)(1) of the Act provides, in general, that proceedings pending before the ICC on the effective date of that legislation shall be decided under the law in effect prior to January 1, 1996, insofar as they involve functions retained by the Act. This decision relates to a proceeding that was pending with the ICC prior to January 1, 1996, and to functions that are subject to Board jurisdiction pursuant to 49 U.S.C. 13709-13711. Therefore, this decision applies the law in effect prior to the Act, and citations are to the former sections of the statute, unless otherwise indicated.

applicability. By decision served September 1, 1993, the ICC established a procedural schedule for the submission of evidence.[2] On July 12, 1995, Armour filed its opening statement. Central failed to submit a reply, and indeed has failed to make an appearance or otherwise participate in any aspect of this proceeding.[3]

Armour asserts that it is entitled to relief from respondent's claims for undercharges under section 2(e) of the NRA and that the rates respondent is here attempting to assess are unreasonable. To support its position, petitioner submits the verified statement of Don Fennelly, Corporate Transportation Manager of Armor Swift-Eckrich, an operating division of ConAgra, Inc.

Mr. Fennelly states that all 32 shipments at issue were transported by Central pursuant to rates quoted to and relied upon by Armour. According to Mr. Fennelly, Central invoiced Armour for each of the subject shipments in accordance with the quoted rates; the originally invoiced charge was paid by Armour; and the payments by Armour were accepted by Central. Mr. Fennelly asserts that the rates originally assessed by Central were comparable to rates offered by numerous other motor carriers available to petitioner and that the rates Central now seeks to assess are more than twice the rates originally quoted to petitioner. He maintains that petitioner would never have used the services of Central had the carrier quoted rates it is now seeking to collect. Attached to Mr. Fennelly's statement is a copy of a document submitted in respondent's original court filing that lists for each of the subject shipments the originally assessed charge, the asserted corrected billing, and the claimed balance due (Appendix A). Also attached to Mr. Fennelly's statement are copies of 30 of the 32 "corrected" freight bills issued by Central for the subject shipments that contain original freight bill data, the corrected billing asserted by respondent, and the claimed balance due (Appendix B).

DISCUSSION AND CONCLUSIONS

We dispose of this proceeding under section 2(e) of the NRA. Accordingly, we do not reach the other issues raised.

Section 2(e)(1) of the NRA provides, in pertinent part, that "it shall be an unreasonable practice for a motor carrier of property . . . providing transportation subject to the jurisdiction of the

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[2] By decision served December 22, 1993, the ICC established a new procedural schedule permitting the parties to invoke the alternative procedure under section 2(e) of the NRA.

[3] Under 49 CFR 1112.3, a party that fails to comply with the schedule for submission of verified statements is deemed to be in default and to waive any further participation in the proceeding. Central's failure to participate in this proceeding should bind it in the court proceeding to the record developed before the agency. See Carriers Traffic Serv. v. Toastmaster, 707 F. Supp. 1498, 1505-06(N.D. Ill. 1988) (carrier on court referral must "live with the record it has made (or failed to make)" before the [Board] when pursuing its undercharge proceeding in the courts).

[Board] . . . to attempt to charge or to charge for a transportation service . . . the difference between the applicable rate that [was] lawfully in effect pursuant to a [filed] tariff . . . and the negotiated rate for such transportation service . . . if the carrier . . . is no longer transporting property . . . or is transporting property . . . for the purpose of avoiding application of this subsection."[4]

It is undisputed that Central no longer transports property.[5] Accordingly, we may proceed to determine whether Central's attempt to collect undercharges (the difference between the applicable filed rate and the negotiated rate) is an unreasonable practice.

Initially, we must address the threshold issue of whether sufficient written evidence of a negotiated rate agreement exists to make a section 2(e) determination. Section 2(e)(6)(B) defines the term "negotiated rate" as one agreed upon by the shipper and carrier "through negotiations pursuant to which no tariff was lawfully and timely filed . . . and for which there is written evidence of such agreement." Thus, section 2(e) cannot be satisfied unless there is written evidence of a negotiated rate agreement.

Here, the record contains a listing of the subject shipments submitted in respondent's court complaint as well as copies of 30 of the 32 "corrected" freight bills issued by Central indicating originally billed charges, assessed by respondent and paid by petitioner, that were consistently and substantially below those that Central is now seeking to assess. We find this evidence sufficient to satisfy the written evidence requirement. E.A. Miller, Inc.--Rates and Practices of Best, 10 I.C.C.2d 235 (1994). See William J. Hunt, Trustee for Ritter Transportation, Inc. v. Gantrade Corp., C.A. No. H-89-2379 (S.D. Tex. March 31, 1997) (finding that the written evidence need not include the original freight bills, or any other particular type of evidence, as long as the written evidence submitted establishes that specific amounts were paid that were less than the filed rate and that the rates were agreed upon by the parties).

In this case the evidence is substantial that the parties conducted business in accordance with agreed-to negotiated rates. The consistent application in the original freight bills of charges significantly below rates that respondent is here attempting to assess confirms the unrefuted testimony of Mr. Fennelly and reflects the existence of negotiated rates. The evidence further indicates that Armour relied upon the agreed-to rates in tendering its traffic to Central, and would not have used respondent's service had it quoted the rates it now seeks to collect.

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[4] Section 2(e), as originally drafted, applied only to transportation service provided prior to September 30, 1990. Here, we note, the shipments at issue moved before September 30, 1990. In any event, 49 U.S.C. 13711(g), which was enacted in the ICC Termination Act as an exception to the general rule noted in footnote 1 to this decision, deletes the September 30, 1990 cut-off date as to proceedings pending as of January 1, 1996.

[5] Board records indicate that Central's outstanding operating authority was revoked as of April 25, 1991.

In exercising our jurisdiction under section 2(e)(2), we are directed to consider five factors: (1) whether the shipper was offered a transportation rate by the carrier other than a rate legally on file [section 2(e)(2)(A)]; (2) whether the shipper tendered freight to the carrier in reasonable reliance upon the offered rate [section 2(e)(2)(B)]; (3) whether the carrier did not properly or timely file a tariff providing for such rate or failed to enter into an agreement for contract carriage [section 2(e)(2)(C)]; (4) whether the transportation rate was billed and collected by the carrier [section 2(e)(2)(D)]; and (5) whether the carrier or the party representing such carrier now demands additional payment of a higher rate filed in a tariff [section 2(e)(2)(E)].

Here, the evidence establishes that Armour was offered a negotiated rate by Central; that Armour, reasonably relying on the offered rate, tendered the subject freight to Central; that Central billed and collected the negotiated rate; and that Central now seeks to collect additional payment based on a higher rate filed in a tariff. Therefore, under 49 U.S.C. 10701(a) and section 2(e) of the NRA, we find that it is an unreasonable practice for Central to attempt to collect undercharges from Armour for transporting the shipments at issue in this proceeding.

This decision will not significantly affect the quality of the human environment or the conservation of energy resources.

It is ordered:

1. This proceeding is discontinued.

2. This decision is effective on its service date.

3. A copy of this decision will be mailed to:

The Honorable James M. Murphy
District Court of Douglas County, Nebraska
Hall of Justice - Room 6
1701 Farnam Street
Omaha, NE 68183

Re: DOC 909, No. 035

By the Board, Chairman Morgan, Vice Chairman Owen, and Commissioner Clyburn.

Vernon A. Williams
Secretary